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10 UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 UNITED STATES OF AMERICA,

Case No. 2:20-CR-00013-TOR-1

13 Plaintiff,

UNITED STATES' SENTENCING
MEMORANDUM

14 v.

15 FAINYAN KAIN JAMES KIMMERLY,

16 Defendant.
17

18 Plaintiff United States of America, by and through Vanessa R. Waldref, United
19 States Attorney for the Eastern District of Washington, and David M. Herzog and
20 Alison L. Gregoire, Assistant United States Attorneys for the Eastern District of
21 Washington, submits the following sentencing memorandum:

22 I. STATEMENT OF FACTS

23 The following facts were stipulated to, pursuant to the plea agreement:

24 Beginning on June 30, 2019, and continuing through July 2, 2019, within the
25 Eastern District of Washington, Defendant knowingly used the social media platform
26 Facebook, and the Internet, to entice a person who had not attained the age of 18 years
27 to engage in sexual activity for which Defendant could have been charged with a
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1 criminal offense; namely, Production of Child Pornography, in violation of 18 U.S.C.
2 § 2251(a), (e).

3 In Facebook messenger exchanges with a minor who was 13 years old at the
4 time, Defendant explicitly requested that the minor take sexually explicit images of
5 the minor's own body and send those images to Defendant using Facebook
6 messenger. The images that Defendant instructed the minor to take and send him
7 depict the lewd and lascivious depiction of the minor's genitals, and thus constitute
8 child pornography under federal law. Defendant used the Internet to entice the minor
9 to record and produce images of child pornography.

10 In 2010, Defendant sustained a juvenile conviction in Spokane county for Child
11 Molestation in the First Degree. At all times relevant to the Information Superseding
12 Indictment, he was required to register as a sex offender under Washington law.

13 II. SENTENCING CALCULATIONS

14 The government agrees with the calculations set forth in the Presentence
15 Investigation Report (hereinafter PSIR). Defendant's offense level is 42, Criminal
16 History Category is V, and Guideline provision is therefore 360 months to life. The
17 government has no objections to the PSIR.

18 III. SENTENCING FACTORS UNDER 18 U.S.C. § 3553(a)

19 In determining the appropriate sentence, this Court should consider the factors
20 as set forth in 18 U.S.C. § 3553(a).

21 1. The nature and circumstances of the offense and the history and 22 characteristics of Defendant.

23 The circumstances of the offense involve Defendant's enticement a minor to
24 engage in illicit sexual activity to include the production of child pornography. ECF
25 No. 56 at ¶¶ 9-30. Defendant was willing to victimize a child who was deeply
26 troubled. ECF No. 56 at ¶¶ 11-12 (noting the minor victim had been a runaway, was
27 removed from her biological parents, had been a cutter). The victim asks when they
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1 can hang out again and Defendant details the explicit photos he wants, promising to
2 come and see the victim the following day *if* she complies. ECF No. 56 at ¶¶ 13, 15.
3 In victimizing a young child, just 13 years old, Defendant preys on the troubled young
4 person's need for love and attention.

5 Defendant's crime is serious as are his history and characteristics, having
6 committed a sex offense against a child previously. ECF No. 56 at ¶ 57.

7 2. The need for the sentence imposed to reflect the seriousness of the offense,
8 promote respect for the law, and to provide just punishment.

9 The government is asking the Court sentence Defendant to a 12-year term of
10 imprisonment and a lifetime term of supervised release upon the completion of his
11 term of incarceration. Such a significant sentence is necessary to reflect the
12 seriousness of the offense, promote respect for the law and provide just punishment.

13 While the government is certainly cognizant of Defendant's age (coming before
14 the Court at 22 years old), his willingness to accept responsibility, and his having
15 suffered significant abuse in his own childhood (ECF No. 56 at ¶¶ 75-82), those things
16 cannot excuse his actions in this case. Defendant has caused further damage to an
17 already damaged child. Damage Defendant, of all people, should have been able to
18 empathize with rather than prey upon. When discussing how Defendant would have
19 known her age, the victim notes not only that she told him her age, but that she ran
20 away and was staying at Crosswalk, which does not permit adults, only runaway
21 minors. ECF No. 56 at ¶ 28. She indicates the Defendant knew that was where she
22 was staying. *Id.* Indeed, the Defendant would know only minors could stay at
23 Crosswalk, as he too had stayed at Crosswalk when he was a runaway minor. ECF
24 No. 56 at ¶ 86.

25 The government argues this offense is serious, and twelve years, is appropriate.
26 The sentence will provide just punishment and promote respect for the law.
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1 3. The need for the sentence imposed to afford adequate deterrence to criminal
2 conduct.

3 Defendant has a history that includes a sex offense. ECF No. 56 at ¶ 57.
4 Specifically, Defendant was convicted of First Degree Child Molestation, committed
5 when he was seventeen years old. *Id.* The victim, with whom Defendant had a trust
6 relationship, reported the sexual touching began when she was ten years old and
7 happened “a lot” of times. ECF No. 56 at ¶59. The victim reported Defendant would
8 touch her bare vagina and breasts and would force her to touch his penis. ECF No. 56
9 at ¶59.

10 Subsequent to Defendant’s commitment for 40 weeks in that case, the victim’s
11 friend came forward indicating she too had been inappropriately touched. ECF No. 56
12 at ¶ 66. Defendant denied that allegation, but admitted he showed both girls his penis.
13 ECF No. 56 at ¶ 69.

14 Defendant was convicted of First Degree Child Molestation in 2017. ECF No.
15 56 at ¶ 57. Thus, Defendant was put on notice as recently as 2017 that sex offenses
16 against minors are taken tremendously seriously, and he was called into court to
17 answer for his actions. That experience failed to deter him from committing the
18 sexual misconduct, against a minor, in the instant case approximately two years later.
19 Thus, the government believes twelve years is a sufficient term of imprisonment to
20 support deterrence.

21 The government also recommends a lifetime term of supervised release. The
22 government is concerned by the recidivism rate for sex offenders generally. *See* Dept.
23 of Justice, Bureau of Justice Statistics, P. Langan, E. Schmitt, & M. Durose,
24 *Recidivism of Sex Offenders Released in 1994*, p. 1 (Nov. 2003) (reporting that
25 compared to non-sex offenders, released sex offenders were four times more likely to
26 be rearrested for a sex crime, and that within the first three years following release
27 5.3% of released sex offenders were rearrested for a sex crime); *Smith v. Doe*, 538
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1 U.S. 84, 104 (2003) (“The risk of recidivism posed by sex offenders is ‘frightening
2 and high.’”) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)). Additionally, the
3 government is concerned for the recidivism of Defendant specifically, given that he
4 has been undeterred by previous sanction.

5 The government is confident the recommended twelve year term of
6 imprisonment followed by a lifetime of supervised release will accomplish adequate
7 deterrence.

8 4. The need for the sentence imposed to protect the public from further crimes
9 of Defendant.

10 As has been detailed, Defendant’s crime is very serious. Additionally,
11 Defendant has significant criminal history in that his prior conviction pertains to a sex
12 offense against a minor as well. ECF No. 56 at ¶ 57. Defendant’s sexual interest in
13 minors makes him a real danger to the public. The government is asking the Court to
14 accept the plea agreement and the sentence proposed by the parties.

15 5. The need for the sentence imposed to provide Defendant with needed
16 educational or vocational training, medical care, or other correctional
17 treatment in the most effective manner.

18 Defendant has not identified any needed educational or vocational training.

19 6. The kinds of sentences available.

20 Defendant is subject to a sentence involving a term of imprisonment. The
21 offense to which Defendant pled guilty carries a mandatory minimum sentence of ten
22 years imprisonment.

23 7. The kind of sentence contemplated by the Sentencing Guidelines.

24 The Sentencing Guidelines contemplates a term of imprisonment.

25 8. Any pertinent policy statements issued by the Sentencing Commission.

26 There are no pertinent policy statements in this case.
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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Colin G. Prince, counsel for Defendant.

s/ *Alison L. Gregoire*
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